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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 218

JOHN CARDILLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 221

LOUIS MARGOLIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 279 Misc.

JOHN KNAPP, PETITIONER

v.

UNITED STATES OF AMERICA

No. 300 Misc.

LOUIS PISELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 316 F. 2d 606.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1963. On May 15, 21 and 27, respectively, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari by Cardillo and Margolis to June 22, 1963, by Piselli to June 22, 1963, and by Knapp to June 24, 1963. Separate petitions for writs of certiorari were filed by Cardillo and Margolis on June 20, 1963, and by Knapp on June 21, 1963. The petition for a writ of certiorari by Piselli was filed out of time on June 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the refusal of two principal government witnesses during cross-examination to answer certain questions on the ground of self-incrimination unduly restricted petitioners' right of cross-examination (Nos. 218, 221, 300 Misc.).

2. Whether the trial court erred in finding that certain statements did not relate to the subject matter of direct examination of a key government witness and, therefore, were not subject to production under 18 U.S.C. 3500 (Nos. 218, 221, 279 Misc.).

3. Whether conversations between government agents and petitioner Margolis, subsequent to a statement given at the time of arrest, deprived Margolis of the assistance of counsel, where the government did not seek to use these conversations as evidence against him (No. 221).

4. Whether the evidence is sufficient to sustain the conviction of petitioner Piselli (No. 300 Misc.).

STATUTE INVOLVED

Section 3500 of Title 18 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement

relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall exercise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * *

* * * * *

STATEMENT

Petitioners and eight others were charged in a four-count indictment returned in the Southern District of New York with offenses arising out of the theft of furs. Count 1 charged the transportation in interstate commerce of stolen furs of a value of more than $5,000. Count 3 charged the knowing receipt

and concealment of the stolen furs. Counts 2 and 4 charged conspiracies to commit the substantive offenses charged in the other counts. Petitioners Knapp and Piselli were charged in all counts and petitioners Cardillo and Margolis were charged in counts 3 and 4 (I A. 1-4).[1] Following a trial before Judge Murphy (a jury having been waived), petitioners were convicted as charged. Cardillo was sentenced to concurrent terms of five years' imprisonment and Margolis to concurrent terms of four years' imprisonment. Knapp was sentenced to a total of twelve years' imprisonment—10 years on counts 1 and 3, and 2 years on counts 2 and 4. Piselli was sentenced to concurrent terms of imprisonment—10 years on counts 1 and 3, and 2 years on counts 2 and 4.

The evidence may be summarized as follows:

Thaddeus Ohrynowicz, a government witness, testified that on September 17, 1960, in New York City, petitioner Piselli agreed to assist him and petitioner Knapp in stealing furs from a furrier in Paterson, New Jersey (I A. 7-9; R. 465-469). On September 18, after driving from New York, they broke into a fur shop in Paterson (R. 473-500). Following the burglary, the three fled separately. Knapp carried some of the stolen furs in his automobile, taking them to a locker in New York (R. 500-506). That evening,

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[1] The record on file with the Clerk of the Court consists of the trial transcript, the original papers and proceedings in the district court and the appendices files in the court of appeals. The trial transcript is designated herein as "Tr.". The appendices are designated by "A.", preceded by volume number.

petitioner Cardillo, who knew of the theft, assisted Ohrynowicz in transporting the furs from the locker to a hotel where the latter was staying (II A. 40-42). Later that night, Ohrynowicz and Knapp met Piselli in front of a New York theatre (R. 510).

On Monday, September 19, Cardillo brought a prospective buyer to examine the furs at a second hotel to which Ohrynowicz had moved them (II A. 42-45). Later that week, defendant Nick Sten brought petitioner Margolis to view the furs and Margolis agreed to buy them from Ohrynowicz (II A. 45-49). On Saturday afternoon, September 24, Ohrynowicz brought two suitcases containing the furs to Margolis at the latter's place of business (II A. 49-50, 54-55). Sten, who said he had obtained the money from Margolis, gave Ohrynowicz $4,000, one day and $3,500 on the following day (II A. 51-52). Ohrynowicz divided the money into three equal parts, deducting $300 to pay Cardillo and Sten (R. 547-553).

ARGUMENT

1. Petitioners Cardillo (No. 218, Pet. 6-18) and Margolis (No. 221, Pet. 16-18) contend that the trial court should have stricken the testimony of key witnesses Thaddeus Ohrynowicz and Max Friedman after these witnesses refused on cross-examination to answer certain questions on the ground of self-incrimination. Petitioner Piselli (No. 300 Misc., Pet. 29-30) joins in this contention so far as the testimony of Ohrynowicz is concerned.

a. Ohrynowicz testified on direct examination both as to the burglary and the sale of the furs. On cross-

examination, he testified that he was arrested at 1:30 a.m. on October 1, 1960, and that this arrest resulted in other criminal charges of breaking and entering with intent to steal. After the court advised the witness that he could decline to answer questions about any crimes for which he had not been convicted, Ohrynowicz refused to answer whether he was "running away from another burglary" at the time of his arrest and whether he was "guilty of those crimes" (III A. 1-6). He also testified that between 1947 and 1954 he had been found guilty of robbery and attempted burglary (R. 443, 656) and that he had committed several burglaries during that period. He asserted the privilege against self-incrimination in relation to a question whether he had committed any burglaries between 1954 and 1960 (III A. 6-11).

The questions which Ohrynowicz refused to answer did not serve to limit appreciably his cross-examination and did not prevent petitioners from exploring the motives which actuated his testimony. Neither an admission nor denial of guilt of other offenses would have opened an avenue for further examination. If the witness had denied the commission of other offenses, a further inquiry into the truth of this statement would have been improper as collateral to the issues on trial. An admission that he was guilty of crimes of which he had not been convicted would have added little. The court knew, as the trier of fact, that the witness faced a pending state charge which might lead him to color his testimony. It also knew of his prior convictions and was thus in a position to take account of his reputation for probity.

b. Max Friedman testified that he gave $5,000 in cash to Lawrence Harris to enable Harris to buy the furs from Margolis (II A. 61). He said he obtained this money from a friend. When asked to name him, he claimed the privilege against self-incrimination, and this was sustained (II A. 73-75). The court of appeals reversed the convictions of Harris and Kaminsky (who was also implicated by Friedman) on the ground that, as to them, the sustaining of the privilege denied them the right of cross-examination on a material matter. It declined to reverse as to Margolis on the ground that his conviction rested on evidence other than that of Friedman. The argument of petitioner Margolis that this was error is refuted by the record.[2]

While Friedman did testify that Harris informed him that he was buying from Margolis furs which had been stolen in New Jersey, this was not the principal evidence against Margolis. The crucial evidence was (1) the testimony of Ohrynowicz as to the sale and delivery of the furs to Margolis (II A. 47-52); (2) the testimony of John Gatsonis that he saw the furs at Margolis' place of business, that Margolis gave him the two valises in which the furs were delivered and that Margolis told him to forget what he saw (II A. 54-55; R. 751); and (3) the statement that Margolis made to the FBI, at the time of his arrest, in which he admitted acquiring the furs

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[2] Cardillo (No. 218) also raises this point but he has no basis to complain since Friedman's testimony did not implicate him.

through Sten from an unknown individual and that he assumed the furs had been stolen. (II A. 100-105) These admissions, amply corroborated, were sufficient to establish the guilt of Margolis on the substantive count. The real significance of Friedman's testimony, so far as Margolis is concerned, was on the conspiracy count, *i.e.*, to show knowledge of the interstate transportation of the stolen furs. But on the substantive counts it was not necessary to show that Margolis knew that the stolen furs had been transported in interstate commerce so long as the goods were in fact in interstate commerce. See *United States* v. *Sherman*, 171 F. 2d 619, 623 (C.A. 2), certiorari denied, *sub. nom. Whelan* v. *United States*, 337 U.S. 931. Since interstate transportation was clearly proved, and since the corroborated admissions went to every other element of the offense, the substantive count was amply established before the trial judge, without regard to Friedman's testimony. That count alone will support the verdict. *Lawn* v. *United States*, 355 U.S. 339, 362.

2. On October 22, 1960, petitioner Margolis was arrested by F.B.I. agent Arthur S. Hamilton. Margolis gave him a statement detailing his involvement in the receipt of the furs and relating that, acting through defendant Nicholas Sten, he acquired the furs from an unknown individual (II A. 99-104). On November 18, 1960, Hamilton, in a 5 to 10 minute interview, asked Margolis if Ohrynowicz was the unknown individual and Margolis replied that he was not. At that time, Hamilton did not

know if Margolis had an attorney (II A. 121-122). The indictment was returned on November 22, 1960 (II A. 1). In February 1961, after telephoning Margolis and asking him if he could see him, Hamilton visited Margolis for 4 minutes. He wanted to know if Margolis and Sten were represented by the same attorney. The purpose of the visit was to determine if Margolis would appear as a government witness. Margolis said that his attorney had advised him that it was all right to speak to Hamilton (II A. 108-110, 112, 117, 122). On April 21, 1961, Hamilton again spoke to Margolis in a 10 to 15 minute conversation. He asked Margolis to testify for the government and told him that he himself would testify in court as to the statements made by Margolis on October 22 (II A. 110-111, 113, 118, 120, 122).

The contention of Margolis that the three conversations with F.B.I. agent Hamilton subsequent to to the day of his arrest interfered with his right to counsel or otherwise prejudiced him is without merit (No. 221, Pet. 9-14). The government did not rely on these conversations to establish guilt. It is not reasonable to suppose that these brief conversations could have had the effect here urged when Margolis did not appear as a government witness and there was no evidence that Margolis was so influenced that he was unable to follow the advice of his attorney. In any event, in the absence of pressure, there is nothing sinister when a government agent asks a de-

fendant if he will appear as a government witness.[3]

3. After Ohrynowicz concluded his direct testimony, the government turned over to the defendants a copy of his testimony before the grand jury and copies of statements made by him to the F.B.I. on October 20 and October 26, 1960. The government submitted to the court for its examination two documents which it refused to turn over to the defense on the ground that they did not relate to the subject matter of the direct examination (R. 555-558). The court examined these documents and concluded that they were not producible under 18 U.S.C. 3500 (R. 560, 648; Court's Exhibits 12, 13). The court of appeals, which examined the sealed documents, agreed with the conclusion of the trial judge.[4]

The procedure followed by the courts below was correct. The decision whether the statements related to the direct testimony of the witness was not allowed to rest with the government. In accordance with the statutory mandate, the United States Attorney turned over the statements to the district

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[3] Margolis' claim that he was denied the right to inspect the agent's interview log (Exhibit 37) showing the duration of the post-indictment conversations is refuted by the report of the trial judge to the court of appeals indicating that the log was turned over to defense counsel for inspection.

[4] The court below described the documents as follows:

"The statements which were not turned over related primarily to a loan made by Ohrynowicz to Sten; who is not before us in this appeal and to Ohrynowicz's activities during the summer of 1960, namely, in June, July and August, prior to the September 18th robbery. The statements do not deal with testimony adduced from Government witnesses on direct examination which affects the appellants herein".

court. After examination, the trial judge agreed that they were not relevant.

4. Petitioner Piselli's challenge to the sufficiency of the evidence is not an issue which calls for further review by this court (No. 300 Misc., Pet. 6-29). The total circumstances of the case—the planning of the burglary in New York, the trip from New York to New Jersey to commit the crime, the separate return of each of the three burglars to New York after the commission of the crime, the meeting between Piselli, Knapp and Ohrynowicz in New York following the transportation of the furs to New York—warranted the trial court's conclusion that Piselli had knowledge of the interstate character of the theft.[5]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963

[5] Since Piselli received a concurrent sentence, it is not necessary to consider whether the evidence was sufficient to sustain his conviction on the receiving counts. *Lawn* v. *United States*, 355 U.S. 339, 362.

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